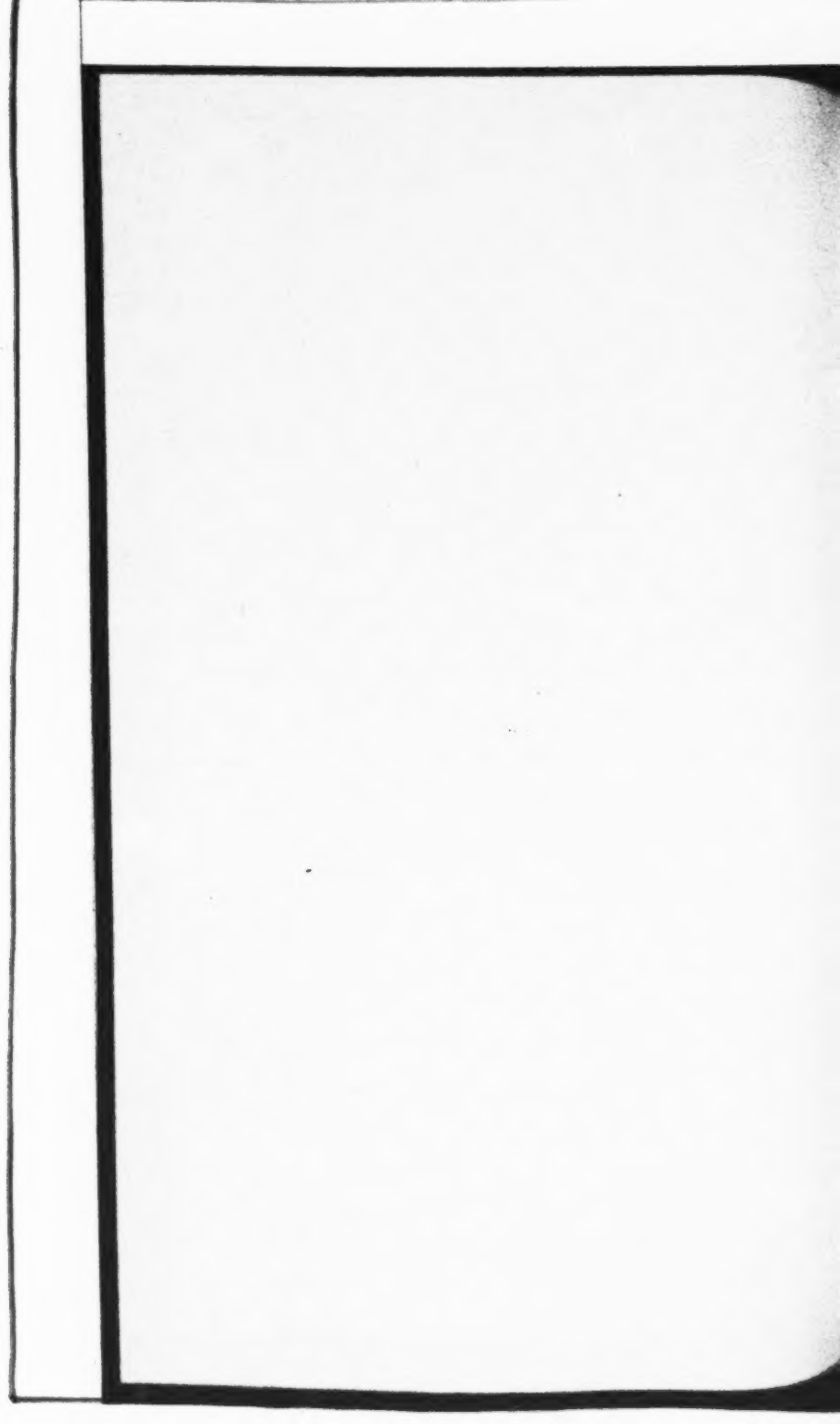


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 120

WILLIAM WARD EHLERT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

A. 32 CFR 1625.2 CANNOT PRECLUDE THE RECLASSIFICATION OF A CONSCIENTIOUS OBJECTOR WHOSE VIEWS MATURED AFTER THE MAILING OF AN ORDER TO REPORT FOR INDUCTION

The Government has taken the position advanced by Judge Duniway concurring below, that "the development of conscientious objection, whether or not some would regard it as beyond the registrant's 'control,' is not the kind of circumstance that was contemplated" by the regulation. (R.O.B. 19.)[1]

[1] R.O.B. refers to the Government's Opening Brief. "The Regulation" refers to 32 CFR 1625.2.

The Government thereby abandons the rationale of the majority below, that "presumptively every human is a rational being having a free will and in complete charge of his own thinking." Appendix (hereinafter A) 34.[2]

The Government reasons as follows: If it is held that late-maturing conscientious objection views *are* a change in the registrant's status due to circumstances beyond his control, then the language of the regulation terminating the right to reopening and reclassification after an order to report for induction is mailed will be read out of the regulation, and dilatory claims must be heard, to the detriment of the smooth supply of manpower to the military.

Second, the Government reasons that if late-maturing conscientious objection views *may be* a change in status requiring reopening, then the local boards will be plunged into a thicket of philosophical speculation inappropriate to their nature and function.

Therefore, the Government continues, such claims are not within the intended ambit of the regulation, and no reopening or reclassification may be had.

The rule for which petitioner argues is as follows:

When the local board is presented with a post-induction-order prima facie conscientious objector claim, i.e., one which on its face would entitle the claimant to the exemption sought, the local board must make a finding as to when the views matured.

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[2]However, the Government attempts to create a mind-set for this dubious proposition, without citing any authority which would support such a conclusion. (R.O.B. 15, 17, 22, 23, and 27.)

If the board finds that the views matured after the order to report for induction was mailed, it must reopen and reclassify the registrant. *United States v. Gearey I,* 368 F.2d 144 (2d Cir. 1966), Cert. Denied 389 U.S. 959; *United States v. Gearey II,* 379 F.2d 915 (2d Cir. 1967), Cert. Denied 389 U.S. 959; *Paszel v. Laird,* 426 F.2d 1169 (2d Cir. 1970); *Scott v. Volatile,* No. 18,546 (3d Cir. Sept. 15, 1970); *United States ex rel. Berman v. Resor,* 429 F.2d 1340 (10th Cir. 1970).[3]

This rule in no way "reads out of the proviso the most essential element of proof necessary for the extraordinary relief of last-minute classification" by requiring only a showing of prima facie entitlement to I-O classification, as asserted by respondent. (R.O.B. 21.) This misconception, as the Court of Appeals for the Second Circuit explained in *Paszel v. Laird, supra,* is derived from a misreading of the short *per curiam* opinion in *United States v. Sandbank,* 403 F.2d 38 (2d Cir. 1968), Cert. Denied 89 S.Ct. 1301, indulged in by certain district Courts in that circuit. That misconception has been dispelled.

Under the rule urged by petitioner, in addition to presenting a prima facie claim for conscientious objection, the registrant must also allege facts from

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[3]The 10th Circuit there reads its earlier opinion in *United States v. Maine,* 417 F.2d 951 (10th Cir. 1969) as holding that

> The emergence of beliefs of conscientious objection after an induction order has been issued can constitute "a change in status resulting from circumstances over which the registrant has no control" within the meaning of the quoted regulation. 429 F.2d at 1343,

and not, as respondent asserts, as merely "dictum in related cases." (R.O.B. 16 n. 3.)

which a board may conclude that the registrant neither slept on his rights nor, after his order to report was mailed, deliberately changed his status to achieve an exemption. Should the board find that the registrant has failed to sustain this additional burden, it need not reopen even if the claimant would otherwise clearly be entitled to exemption, and, of course, such a conclusion is unassailable upon judicial review if there exists a basis in fact to support it. *Estep v. United States,* 327 U.S. 114 (1946).[4]

Under the authority of the cases cited above, the teaching of the philosophers, and common experience, petitioner has argued and the dissenters below agreed that conscience is by definition not compellable, that views which may be consciously altered are unworthy of that name, and that the majority below was therefore wrong in presuming the contrary. Further, even where unarguably controllable activities have provided the basis for one's conclusions, e.g., study and inquiry, the conclusions themselves are beyond one's control, insofar as one has fairly permitted the evidence to determine the conclusion. See Aldisert, J., concurring in *Scott v. Volatile,* ..... F.2d ....., ... (3d Cir. 1970) (slip opinion, p. 18). Such a result satisfies both the national policy of protecting conscience and the reasonable requirement that claims for exemption

[4]We do not concede as an abstract proposition that bona fide conscientious objectors may be compelled to choose between military service and prison, based on the time their views mature or are reported, *whenever* this occurs. We are not, however, compelled by the facts and law of this case to argue this perhaps more difficult position, which the legislative intent cited infra at p. 23 would seem to support. And see Petitioner's Opening Brief (hereinafter P.O.B. 17, n. 27).

from military service be promptly asserted. It does not, as respondent suggests, require the Court to take sides in a scholastic dispute.

Local boards were not created to resolve philosophical questions in the abstract, but to deal in concrete cases. Both parties agree that the purpose of the regulation is to relieve the board of the burden of granting the ordinary procedural privileges to merely dilatory claims asserted after a certain cut-off date. The board then must determine whether the claim is dilatory, by determining whether the facts upon which the claim is based existed and were known to exist prior to the cut-off date (culling out those who have slept on their rights), or whether the registrant, learning that induction is imminent, has deliberately created a set of circumstances in a last-minute attempt to forestall induction by achieving a deferred status.

In actual practice, the scope and standards of the inquiry are familiar to local boards. Although the decision is difficult and much rests upon it, the board is not required to determine whether the registrant's statement is, in a philosophical or theological sense, "true",[5] or even whether it is comprehensible. The board is required to determine, from facts submitted by the registrant, whether the registrant's post-mailing claim is based on pre-existing views tardily asserted, or is the result of a conscious effort to acquire views in oppostion of war in any form—in the words

[5]This, contrary to respondent's contention, is the inquiry forbidden to be made under *United States v. Seeger*, 380 U.S. 163 (1965).

of Judge Aldisert, "Opt[ing] for a belief without being 'driven' by the evidence, or in spite of the evidence," *Scott v. Volatile,* slip op. 18—or is, like Ehlert's, a claim which demonstrates the coalescence of previously unformed views into sincere conscientious objection after the notice to report was mailed.

If the board finds the latter set of facts to exist, then, petitioner insists, the board must reopen and reclassify the registrant.

There is no substance to respondent's assertion that the regulation can not apply to late-maturing conscientious objectors and that neither Courts nor local boards can interpret the language and intent of Congress and the President to achieve a sensible result. Even if this proposition were true, it would not follow that the late-maturing conscientious objector must bear the burden of a regulation containing a deadline for asserting his claim without the benefit of the exception to the deadline found in the same regulation.[6] Such an interpretation, we have argued, would be *ultra vires* and void. See P.O.B. 17, n. 27. We shall show that the case law, the legislative history, the language of the regulation and consider-

[6]The Government's position creates loose ends and requires futile acts both of the registrant and of the local board. The registrant must still notify the local board of any change in his status, 32 CFR 1625.1(b), even though, according to the Government, they are foreclosed from acting upon that notice. The board must send the registrant an SSS Form 150, 32 CFR 1261.11, although they cannot act upon it. The registrant must return that form in a fixed number of days, 32 CFR §1606.51(a), SSS Form 150, and yet the board may not act upon it. The statute and the regulations require all these acts by the parties; yet all these acts, if respondent is correct, are sterile, dry and futile.

ations of public policy do not support such an unconscionable result.

1. The Weight of Authority Does Not Compel the Denial of Reopening to the Late Maturing Conscientious Objector.

The Government asserts that acceptance of petitioner's position would have the result of overturning "the weight of judicial . . . precedent which sustains a specific cut-off date for submission of pre-induction conscientious objector claims . . ." (R.O.B. 16.)

Many of the cases referred to by respondent either do not speak to the issue at hand or reason to a different conclusion than that reached by respondent.[7]

The Government has cited seventeen cases in support of its arguments. (R.O.B. 15-16.) In seven of these cases, the registrant's claim was either made before the order to report for induction was mailed, or was based upon a status existing before the order was mailed.[8]

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[7]It should be kept in mind that all of the earlier cases, like the one at bar, arose under the pre-1967 Act, which required a Justice Department investigation, hearing and report as a consequence of an appeal from the denial of a claim for classification as a conscientious objector by the local board. (June 24, 1948 C. 625, Title I, §6, 62 Stat. 613.) This procedure sometimes created delays of as long as two years, and was amended out of the 1967 Act. Petitioner suggests that this extensive delay as a consequence of reopening may be an unspoken raison d'etre in the holdings of cases cited below.

[8]*United States v. Bartelt*, 200 F.2d 385 (7th Cir. 1952); *Boyd v. United States*, 269 F.2d 607 (9th Cir. 1959); *United States v. Taylor*, 351 F.2d 228 (6th Cir. 1965); *Porter v. United States*, 334 F.2d 792 (7th Cir. 1969); *Parrott v. United States*, 370 F.2d 388 (9th Cir. 1966) cert. denied 387 U.S. 908; *United States v. Kroll*, 400 F.2d 923 (3d Cir. 1968) cert. denied 393 U.S. 1069; *Davis v. United States*, 374 F.2d 1 (5th Cir. 1967).

In three of the cited cases, the registrant either never made a claim for exemption or introduced no facts to support his claim.[9] In these cases, the result would have been the same had the *Gearey* rule been applied.

Leitner v. United States, 222 F.2d 363 (4th Cir. 1955) is simply not in point.

United States v. Jennison, 402 F.2d 51 (6th Cir. 1958), Cert. Denied, 394 U.S. 912, is highly equivocal. The holding of the Court was two-pronged. *Taylor,* n. 8, *supra,* was read as holding that a draft board is not *required* to consider a claim of conscientious objection asserted after notice of induction has been mailed even if a conversion to conscientious objection has matured after mailing of such notice. The court did *not* hold that such reconsideration was barred. Second, the *Jennison* Court held that the claim presented in that case was "not such as to require the Selective Service authorities to find that, in such period, there had occurred a change in his status resulting from circumstances 'over which the registrant had no control.'" 402 F.2d at 52.

The Court said:

> It appears that appellant's beliefs likely had matured prior to receipt of the induction notice . . . 402 F.2d at 54.

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[9] *Feuer v. United States,* 208 F.2d 719 (9th Cir. 1953); *United States v. Mohammed,* 288 F.2d 236 (7th Cir. 1961) cert. denied 368 U.S. 820; *Dugdale v. United States,* 389 F.2d 482 (9th Cir. 1968).

Judge McCree, dissenting, felt that the regulation could not stand unless it was interpreted so as not to bar genuine post-notice claims.

Two other cases cited as authority by respondent actually support the position advanced by the petitioner.

In *United States ex rel. Berman v. Craig*, 207 F.2d 888 (3d Cir. 1953), the local board classified the registrant I-A, then mailed an order to report for induction less than 10 days after the date of that classification. Berman's application for ministerial deferment was received after the order to report for induction had been mailed, but within 10 days of the date he learned of his acceptance to a theological seminary. The Court of Appeals reversed his conviction, finding a violation of procedural rights. The Court said:

> Sections 1625.1 and 1625.2 of the Regulations taken together require a local board to consider anew the classification of a registrant who reports, within 10 days after it occurs, a change in his status which may require his reclassification. This it is the board's duty to do even though, as here, an order to report for induction has been sent to the registrant, provided he has not yet been inducted. Such a timely report was made . . . by Berman through his telegram of July 3, 1952. . . . The local board should have given consideration to Berman's change of status and determined whether it required his reclassification. 207 F.2d 888, 891.

Thus, as early as 1953, the Third Circuit held that the mailing of an order to report for induction is

not an absolute bar to reopening and reclassification even where the change in status antedates that mailing.

The holding in *Keene v. United States*, 266 F.2d 378 (10th Cir. 1959), is directly contrary to the concurring opinion of Judge Duniway below, upon which respondent relies so heavily, and in fact was relied upon as authority by the Court in *Gearey I, supra.*

In *Keene*, the defendant applied for an exemption as a conscientious objector by letter on the date his order to report for induction (SS Form 252) was mailed to him by his local board. The Board made a specific finding of no new change in status due to circumstances beyond his control. The Court there found that the defendant had entertained the beliefs that he claimed exempted him from service for at least three months prior to the order to report for induction; hence, there was no change in status after the induction notice was mailed. As to the applicability of the regulation, the Court said:

> *We think the Regulations have application to a conscientious objector's claim as all other claims for a change in status* . . . Our question then is narrowed to whether the appellant is entitled to have his classification reopened and considered anew on the grounds of a change of status due to circumstances beyond his control. This is to say, a change of status due to a change of conscience occurring after the notice to report was mailed. *If such change did occur, the board erroneously refused to reopen and review,* and an appeal lies therefrom by force of the statute, although no provision in the Regulations is made therefor. 266 F.2d 378, 384. (Emphasis added.)

The cases upon which respondent relies which do in fact support respondent's position in turn rely on *United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953). Not only was the issue as there presented not thoroughly briefed and argued by counsel, since it appears that it was first raised at oral argument on appeal, but the decision rendered by that Court was devoid of any reasoning, logic or authority to support its conclusion that conscientious objector beliefs which mature after the mailing of an order to report for induction fall outside of the contemplated scope of the Regulation. The Court there merely said:

> On oral argument before this court, defendant's counsel suggested that conscientious objections resulting from the promptings of a registrant's conscience would be a change in status over which the registrant had no control. We cannot acquiesce in such a strained interpretation of the regulation. There was no other claim of a change in status. The Board did not find any change in defendant's status, and therefore in failing to reopen defendant's classification it did not exceed its powers or act in an arbitrary manner. 201 F.2d at 32.

The balance of respondent's authority rests upon this insecure foundation. *United States v. Helm,* 386 F.2d 434 (4th Cir. 1967) Cert. Denied 390 U.S. 958, relies solely upon *United States v. Al-Majied Mohammad,* 364 F.2d 223 (4th Cir. 1966). That case rested its opinion upon *Schoebel, supra,* and upon *Porter v. United States,* 334 F.2d 792 (7th Cir. 1964). *Porter,* in turn, relied upon *Schoebel* (although, as indicated earlier at n 8, Porter's change of status antedated

his order to report), and, as we have shown, the *Schoebel* "holding" is almost an afterthought, unsupported by analysis or authority.

2. Construction of the Regulation.

(a) Legislative history and administrative authority.

The Government theorizes that all post-mailing claims are barred except in "the unusual emergency situation where an unforeseeable event, such as a death in the family, may give rise to a belated claim of deferment . . . or exemption," (R.O.B. 14-15), and therefore concludes that hardship, dependency, and sole-surviving son claimants may be heard, while late-maturing conscientious objectors may not. The Government cites nothing to support this conclusion, which is in fact directly contrary to the express intent of Congress.

The congressional debates surrounding the passage of Senate Bill 1432, which became the Military Selective Service Act of 1967, indicate no such intent to discriminate against conscientious objectors.

In the House of Representatives, in a summary of the provisions of the House Committee version of S. 1432, we find the following:

> Mr. Smith of California: Registrants claiming conscientious objection will therefore be afforded the same appeal procedures and administrative remedies that are available to all other registrants. 113 Cong. Rec., May 25, 1967, 14094.

Representative L. Mendel Rivers, the Chairman of the House Committee on Armed Services, spoke in almost identical terminology:

> Registrants claiming conscientious objection will therefore be accorded the same appeal procedures and administrative remedies that are available to all other registrants. Id., 14097-98.

Thus, it is clear that Congress intended conscientious objector claimants to have identical rights of reopening and reclassification as hardship claimants, sole-surviving son claimants, or any other claimant. As for administrative precedent (R.O.B. 16), the Government cites no authority, nor does it question that the state directors of at least two states have provided detailed guidelines for processing post-notice claims of induction for conscientious objector status. (P.O.B. 28, n. 53.)

(b) The plain language of the regulation.

Respondent, in accord with Judge Duniway below, theorizes that "what the draftsmen of the regulations contemplated . . . was simply the occurrence of some objectively identifiable extraneous event or circumstance . . . and not some element of the registrant's internal thought processes." (R.O.B. 23-24.)

Such an intent is not clear. No authority beyond respondent's own reading of the language of the regulation is cited to show such an intent, save the concurring opinion of Judge Duniway below. The argument of that learned Judge was that "circumstances" must mean circumstances *external* to the registrant, and since conscience is an internal change, the regulation cannot apply. The basis for that opinion was a particular reading of the words of the

regulation. Respondent suggests this reading is erroneous, and that an alternative reading is correct and just. Perhaps it is the Latin origins of the word "circumstances"—"standing around"—that leads to the image of events outside the registrant somehow being required by the regulation. But the regulation does *not* read "a change in the *registrant* resulting from circumstances beyond his control," it reads "a change in the registrant's *status* resulting from circumstances beyond his control." Thus, the regulation does not require some external act or event "standing around" the *registrant;* it requires some act or event external to the registrant's *status.*

The registrant's status in this context can only mean his *draft* status, and, in the case at bar, the only relevant change in that status is the change in the registrant's views from a position where military service does not violate conscientiously held beliefs to a position where such service has become morally impossible.[10]

There is no specific language in the regulation which states that claims of conscientious objection shall categorically be barred after an order to report is mailed. This is not surprising, in view of the legislative history previously cited. But certainly had the President intended the regulation to bar these claims, such an exclusion would have been carefully spelled out, in view of the nature of such claims and the long-standing tradition of affording them protec-

[10]See the rebuttal of Judge Duniway's argument by Merrill, J., dissenting below at A. 44.

tion. See *United States v. Underwood*, 151 F.Supp. 874, 876 (E.D. Pa. 1955).

The Government argues that there is no discrimination against conscientious objectors, because claims of a change to student or occupational status are also foreclosed by the regulation. But it is not possible that one may enroll in a school[11] nor is it likely that one's occupation could become necessary to the national interest[12] through circumstances beyond one's control.

The regulation may properly be applied to prevent a registrant from gaining a reopening and reclassification by unarguably volitional acts.

Further, no reason is advanced for the Government's proposition that it is proper to make an exception for belated claimants for deferment on grounds of extreme hardship and not for belated conscientious objector claimants. Army Regulation 635-200 provides a forum and a remedy for in-service hardship claimants; the inquiry may be more complex and time-consuming in the hardship case than in the conscientious objection case, and, perhaps most important, the military forum is at least *accessible* to the hardship claimant, whose conscience does not compel him to refuse to submit to induction.

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[11]But see *United States ex rel. Berman v. Craig*, 207 F.2d 888, 890 (3d Cir. 1953).

[12]Normally, at least, this is true, but suppose that, prior to April 23, 1970 when occupational deferments were abandoned, an accident in a defense plant incapacitated all but one engineer on a team of engineers doing critical defense research. The services of that survivor may have become necessary to the maintenance of the national health, safety or interest within the meaning of 32 CFR 1622.22, through circumstances beyond his control.

(c) There are no policy considerations of sufficient weight to justify denying the late-maturing conscientious objector the right to a reopening after mailing of an order to report for induction.

The Government argues that the purpose of 32 CFR §1625.2 is to prevent dilatory claims from disrupting the operation of the Selective Service System. Further, the Government insists that to recognize such claims is unfair to other registrants, whose induction would thereby be accelerated, and who might be drafted where "in the normal course of events, [they] would not have been reached". (R.O.B. 14, n. 6.) These factors are referred to by the Government as "overriding policy considerations". (R.O.B. 14.)

We agree with respondent as to the purpose of the regulation. However, a true late-maturing conscientious objection claim is *not* "dilatory"—that is, either made for delay or made after the registrant has slept on his rights. Here petitioner's claim for exemption as a conscientious objector was made promptly upon the maturation of the views it communicated to the board. To insist, as the Government does, that Ehlert's claim should have been submitted before his conscientious objection was fully mature, is both absurd and an invitation to make false statements with respect to his Selective Service classification, a violation of law.[13]

In response to the unsupported assertion that granting a few conscientious objector claimants the right to have their claims heard will plunge the

[13] 50 U.S.C. App. §462(a).

Selective Service System into chaos, petitioner has discussed at length in his opening brief how postponements and delays in inductions are quite routinely granted in numerous other cases without any apparent disturbance in the orderly satisfaction of military manpower requirements. (P.O.B. 27-29.)

Nor, in any given case, is the burden of dealing with a conscientious objection claim significantly greater than that encountered in resolving other routinely-handled claims. The material before the board in deciding a conscientious objection claim is generally the registrant's completed Form SSS 150 (Special Form for Conscientious Objectors) (See A 54) and whatever supporting letters he himself can muster. On the other hand, the inquiry necessary to determine an extreme hardship claim, 32 C.F.R. §1622.22, especially if that claim involves emotional hardship, may call for inquiries about his financial situation, his family life, the emotional and physical health of his dependents, a projection of the impact of his induction upon these elements, and finally a decision based upon these objective and subjective factors which may be much more difficult to make than that required in the conscientious objection situation.

The impact upon military manpower of the brief delay which a reopening might require is, of course, nil, as the services of the sincere conscientious objector claimant will be denied to the armed forces in any case. See *United States v. Freeman,* 388 F.2d 246. (7 Cir. 1967).

The government asserts that to recognize late-maturing conscientious objection claims is unfair to other registrants, whose induction is accelerated and who might be drafted where "in the normal course of events, [they] would not have been reached." (R.O.B. 14, n. 6.) This only begs the question as to what the so-called "normal course" is and should be. It is only unfair to other registrants to hear such claims if the necessary postponement or cancellation of the imminent induction order is unlawful. If the government is arguing that to grant exemption from service to those conscientiously opposed to participation in war in any form is unfair to others, its remedy is to seek the repeal of 50 U.S.C. App. 456(j).

In sum, the government's contentions do not advance any legitimate purpose, and lead to the following results: No relief to other registrants, some slight relief to the local board, and no relief to the military who, the government later insists, should itself shoulder the burden of hearing such claims.

Compare these ephemeral benefits with the other results of the government's interpretation: In the face of a time-honored tradition of protection of the conscience of the individual more ancient than the Republic itself, and in the face of an Act of Congress which provides that "nothing contained in this Title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form," 50 U.S.C. App. 456(j), sincere conscientious objectors of peti-

tioner's class are denied even a hearing on their claims for exemption.[14]

3. The Government's Interpretation of the Regulation Creates a Class of Conscientious Objectors Who Are Denied a Forum to Assert Their Claims.

We have shown that the regulation as construed below creates a "no-man's land" for that class of conscientious objector claimants whose views mature between the date that an order to report for induction is mailed and the date set for induction. (P.O.B. 21.) The Government dismisses this argument by asserting that "[the claim] can be considered by the military immediately upon induction." (R.O.B. 25.) However, petitioner is not merely a claimant seeking a forum; he is a man who is conscientiously opposed to participation in war, to the extent that it is morally impossible for him to submit to induction into the Armed Forces.

The Government's position creates the paradox whereby a claimant for conscientious objector status must submit to induction in order to assert that it is impossible for him to submit to induction!

We reaffirm that the regulation as interpreted below bars Ehlert from any forum, either Selective Service

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[14]The government argues that there is no absolute statutory right to exemption because §456(j) only applies when the claim "is sustained by the local board."

Even assuming *arguendo* that conscientious objectors only have a statutory right to exemption after the board grants them a conscientious objector classification, the language of the statute fairly implies a right at the very least to an opportunity to raise a claim and have a decision upon the merits without having first to submit to induction, upon which no regulation may infringe.

Respondent argues for a rule which prevents the local board from examining the claim, much less sustaining it.

or military, and is thus unconstitutionally discriminatory, contrary to national policy and contrary to the mandate of Congress.

In two categories of cases, registrants who had submitted claims for exemption as conscientious objector prior to induction have been granted habeas corpus relief by the Courts after the military has denied their subsequent applications for discharge as conscientious objectors pursuant to Department of Defense Directive (hereinafter DoD) 1300.6.

The first category consists of those cases where the Courts have found that the later in-service claim was somehow different from the claim earlier denied by Selective Service, and thus not barred by Army Regulation 635-20 Para. 3b(2).[15] *United States ex rel. Healy v. Beatty,* 424 F.2d 299 (5th Cir. 1970); *United States ex rel. Barr v. Resor,* 309 F.Supp. 917 (D.D.C. 1969); *Aquilino v. Laird,* 316 F.Supp. 1053 (W.D. Texas, 1970) [on remand from the Fifth Circuit, 429 F.2d 573 (5th Cir. 1970)]. And see *Goodwin v. Laird,* No. C-70-808 (N.D. Cal., June 19, 1970), 3 Sel.Serv.L. Rep. 3151.

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[15]AR 635-20, 22 January 1969

Requests for discharge after entering military service will not be accepted when . . .

(2) Based solely on conscientious objection which existed, but was not claimed prior to induction . . .

This regulation was amended on 31 July 1970 (effective 15 August 1970) to read:

Requests for discharge after entering military service will not be *favorably considered* when . . .

(2) Based solely on conscientious objection which existed, but was not claimed prior to *notice of* induction . . . (changes emphasized).

As we shall show, this change affords no relief to the conscientious objector who cannot submit to induction.

The second category is similar to the case at bar and consists of cases where the pre-induction claim was made but not decided on the merits. *Baker v. Laird,* 316 F.Supp. 1 (1970) [special form for conscientious objectors requested prior to mailing of induction order but received afterward; Board refused to reopen under 32 C.F.R. §1625.2]; *Peterson v. Laird,* No. C-70-807 (N.D. Cal., August 12, 1970), 3 Sel.Serv.L.Rep. 3120 [misadvice by local board, refusal to supply special form for conscientious objectors].

In *Baker* the petitioner submitted a completed request for classification as a conscientious objector after an order to report for induction had been mailed. The local board refused to reopen, and Baker submitted to induction. After Basic and Advanced Training, Baker applied for a conscientious objector discharge, which was denied. In granting habeas corpus, the district Court held: (1) Baker's views had strengthened and changed during his service period, hence his in-service claim was not "based *solely* on conscientious objection claimed and denied by the Selective Service System prior to induction," [emphasis added] and (2) Baker's claim, while made before induction, was not denied on the merits, but on procedural grounds, hence his in-service claim was not barred by AR 635-20, ¶3B(2).[16]

[16]We discuss only the Army regulations implementing DoD 1300.6, because the relevant cases involve soldiers, the other service regulations are very similar, and the vast majority of draftees are inducted into the Army.

The Court said:

> "The crystallization requirement of Army Regulation 635-20 is not intended to deny sincere conscientious objectors an opportunity to have their claims considered, but only to designate the proper forum in which their claims should be brought. See *Milton v. Commanding General,* ___ F.Supp. ___ [No. C-70-368] (N.D. Cal. 1970). Such a principle of forum apportionment guarantees to the applicant at least one fair chance to have his conscientious objector claim considered. The Government contends that for Baker's in-service application to be entertained would be giving him a second bite at the legal apple, but the facts of the present case are such that to accept the Government's position would be to afford Baker little more than a brush across the mouth of that cherished fruit. Crystallization is undeniably a subtle and ephemeral process which should not be interpreted in such a way as to deny relief to a sincere conscientious objector. *Goodwin v. Laird,* ..... F.Supp. ..... [3 Sel.Serv. L.Rep. 3151] (N.D. Cal., 1970)." 361 F.Supp. at 5.

While this holding, if generally followed,[17] will ameliorate the "no-man's land" effect for late-matur-

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[17]Note that the Army denied Baker's claim, and the Government vigorously defended their action in doing so, in the face of respondent's assertion that ". . . nor to our knowledge has the Directive ever been so applied." (R.O.B. 26.)

As William P. Thompson, the representative of the National Council of Churches, pointed out during the Senate hearings on the 1967 Act,

> "It is our impression that the administrative provisions of Directive No. 1300.6 are discretionary with the Armed Services, and that recently this discretion has been exercised in ways that seemed arbitrary and unnecessarily harsh." Senate Committee on Armed Services, Hearings on S. 1432, 379 (1967).

ing claims submitted by registrants who can conscientiously submit to induction, it does *not* fulfill the guarantee of "at least one fair chance to have his claim considered" to the registrant who, like Ehlert, cannot in conscience submit to induction. To stretch the *Baker* metaphor, it places the legal apple in a tree which the registrant cannot, in conscience, climb.

Nor did Congress intend that persons whose conscientious objection matured before induction should be required to submit to induction in order to have their claims heard.

In the majority report of the House Committee on Armed Services on the bill which became the Military Selective Service Act of 1967,[18] a result, identical to that which the Government here suggests, was proposed by an amendment requiring all conscientious objectors to submit to induction and to noncombatant service. There was serious objection on the floor of the House:

> Mr. Kastenmeier: The Committee bill, as reported, would return to the World War I practice of inducting conscientious objectors into the armed forces and be required to perform noncombatant duties. This procedure in World War I created many difficulties, court martials, long imprisonments, and even death sentences, though no executions were carried out. Cong. Rec., May 25, 1967, 14119.
>
> Mr. Reuss: Requiring the actual induction of conscientious objectors goes directly counter to the valid principles of conscientious objection. I

[18] 50 U.S.C.App. §§451, et seq., June 30, 1967, Pub.L. 90-40, §1(1), 81 Stat. 100.

> hope this change in the new law will be rejected. *Id.*, 14131.

This proviso was unanimously amended out on motion of Representative L. Mendel Rivers, Chairman of the House Armed Service Committee. *Id.*, 14141.

As Representative Schwerber said:

> It cannot be emphasized too strongly that for the great body of religious objectors the objection is not merely to war and killing, but to induction in the armed forces, and to service under the military arms of the government . . . [citing the Mennonites]. The tragic result of not accepting the amendment now offered could well be the imprisonment of thousands of religious objectors sincerely desiring to be loyal to their Nation but unable to violate their higher loyalty to that which they believe God requires of them . . . *Ibid.*

Nor would requiring late-maturing conscientious objectors to have their claims heard by the military make any sense in terms of forum apportionment. Congress has placed upon the Selective Service System the fundamental responsibility of making findings and sustaining or not sustaining claims of conscientious objection. The local board is required to be composed of members residing in the county of its jurisdiction, 50 U.S.C.App. §460(b)(3), and hence presumably having some opportunity for acquaintance with the registrant and whomever he may request to support his claim.[19] It is their sole function to select

[19]This is, at least, the position of the Government. See *United States v. Weller*, No. 77 this Term, Brief for the United States, 30. But see Brief for appellee in that case, 45.

and supply to the military certain numbers of fit and willing men for training and service.

For the Army, on the other hand, to process conscientious objectors is a serious burden and a distraction from their fundamental mission. As this Court has said in another forum-allocation context:

> Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. *O'Callahan v. Parker,* 395 U.S. 258, 262 (1969).

B. EHLERT'S CLAIM ENTITLED HIM TO A REOPENING AND A RECLASSIFICATION

Under the rule urged by petitioner, he is entitled to a re-opening and re-classification if the local board finds that the applicant's briefs ripened only after his order to report for induction was mailed and that his beliefs qualify him for classification as a conscientious objector. Two basic principles apply to this rule: The claimant bears the burden of showing the above facts to be true, and the local board's decision is conclusive on review if there exists a basis in fact to support it.

What was the decision of the local board in this case? The Board decided not to re-open because the "claim was not a change in [Ehlert's] status which

was beyond [his] control." A 61. The Board did not dispute, or, apparently, ever reach the genuineness of Ehlert's claim, nor did they make a finding as to when his views matured. Thus, we do not know whether the Board decided that Ehlert's views preexisted the order to report or whether they felt his views were not sincerely held, or whether they erroneously decided his views were insufficiently "religious." *Welsh v. United States,* 398 U.S. 339 (1970).

A number of recent cases have held that the local board's failure to state any reason for denying a registrant's prima facie claim for exemption vitiates the legality of a subsequent order to report for induction. *Scott v. Volatile, supra; United States v. Broyles,* 423 F.2d 1299 (4th Cir. 1970) (en banc); *Capobianco v. Laird,* 424 F.2d 1304 (2d Cir. 1970), pet. for cert. pending (1970); *Paszel v. Laird, supra; United States v. Abbott,* 425 F.2d 910 (8th Cir. 1970); *United States v. Haughton,* 413 F.2d 736 (9th Cir. 1969).

The reasoning is significant in the present context:

> In any case where the board fails to disclose the basis for its decision, we risk blind endorsement of a mistake of law. *United States v. Broyles,* 423 F.2d at 1304.

Thus, behind the mask of a refusal to reopen couched in the naked words of the regulation, arbitrariness, error of law or malice may lurk. Searching the registrant's claim with a fine glass for some speck of basis-in-fact will not reveal the unstated reasons for the denial of that claim.

Ehlert's claim, on its face, alleges facts which clearly indicate that he is conscientiously opposed to participation in war in any form, and that such views matured after the order to report for induction was mailed. A 51, 54-57. This was the finding of the trial judge who had the opportunity of hearing Ehlert examined and cross-examined under oath, and to satisfy himself by questions from the bench. Even without the benefit of Ehlert's demeanor on the stand to aid them, eleven of the thirteen judges of the Court below also found that Ehlert presented a *prima facie* case and that his views matured after the order to report for induction was mailed. (P.O.B. 26.) Thus, there is no substance to the respondent's argument that the local board's refusal to re-open was warranted.

The Board could not have found that Ehlert did not make a prima facie case. The Government seeks to support such a finding by stressing the phrases "today" and "at this time" in the text of Ehlert's claim. (R.O.B. 37.) To apply the principles of baroque pleading to the claim of a conscientious objector, thereby finding a negative pregnant with the implication that the claimant thus enthusiastically approves of wars past and future is, we think, grotesque.

Nor can Ehlert's reply to the question, "[U]nder what circumstances, if any, do you believe in the use of force?" provide a basis in fact for denying his claim. He replied, "Under any circumstances in which the use of force would not make more probable the destruction of the human race." A. 55. This Court

may notice that since August 6, 1945, any war anywhere makes more probable the destruction of the human race. It is opposition to war which is of the essence of a conscientious objection claim, not opposition to the use of force in any form—the law does not require petitioner to abhor the findings of Sir Isaac Newton.

The Government also seeks to show petitioner's objection to a "nuclear orgasm which would be totally destructive of human life and values" rests solely upon considerations of policy R.O.B. 37. But Ehlert's statement that "I consider that my duty not to work for the destruction of the human race is superior to any duties which may arise from any human relation." A. 54, is not contradicted anywhere in the record. The objection is clearly based on moral and ethical grounds, upon a duty superior to that arising from any human relation. *United States v. Seeger,* 380 U.S. 163 (1965); *Welsh v. United States,* 398 U.S. 339 (1970). A conscientious objector is not required, in addition, to believe that the total destruction of the human race is somehow politic.

Further, Ehlert's claim that his views matured after the order to report for induction was mailed is uncontradicted. Of course, as Ehlert frankly stated (A 51) his views had antecedents. A lightning transformation from fascist warmonger to total pacifist is not required. *Scott v. Volatile, supra,* Slip Opinion 6.

CONCLUSIONS

For the foregoing reasons, the judgment of conviction should be REVERSED.

Dated, December 14, 1970.

Respectfully submitted,

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